SI RUSA BEACH RESORT SDN. BHD.

v.

ASIA PACIFIC HOTELS MANAGEMENT PTE. LTD.

FEDERAL COURT, KUALA LUMPUR
ABDUL HAMID OMAR CJ (MALAYA)
MOHD. AZMI FJ
SYED AGIL BARAKBAH FJ
[CIVIL APPEAL NO. 76 OF 1984]
16 MAY 1984

CIVIL PROCEDURE: *Interim injunction - Application to set aside - Whether there were triable issues - Whether damages adequate remedy - Whether balance of convenience in favour of respondent - Factors to be considered - Whether status quo should be maintained.*

The appeal was against the order of Peh Swee Chin J, dismissing the appellant's application to set aside an interim injunction granted to the respondent. The appellant was a wholly owned subsidiary of Si Rusa Inn Sdn. Bhd., a private limited company owned by A. Chelliah and members of his family ("Owner"). Si Rusa Inn was managed and operated by the Chelliah family. A. Chelliah was the executive director of the appellant Company. On 14 March 1983 an agreement replacing an earlier one was entered into between the appellant and the respondent, a company incorporated in Singapore ("Operator"). The agreement provided that the respondent was to operate the hotel.

On 6 June 1983 the respondent made an *exparte* application for an interim injunction against the appellant. The appellant applied to set it aside.

The Judge dismissed the application on the grounds:

(a) that there were serious questions to be tried;

(b) that damages would not be adequate if the Operator were to succeed at the trial in establishing his right to a permanent injunction and

(c) that the balance of convenience lay in favour of the Operator.

The appellant appealed.

Held:

[1] There were serious questions to be tried.

[2] However, it was not the Court's business to resolve those serious and difficult questions of law at that stage of the litigation. They were matters to be dealt with at the trial. *(American Cyanamid Co. v. Ethicon Ltd.* [1975] 1 AER 504 at 510)

[3] Since there were serious factual questions to be tried, the question of adequacy of compensation by an award of damages could not be properly determined.

[4] The balance of convenience lay in favour of the appellant. In the circumstances of the case, the *status quo* must be maintained and the Owner must be allowed to continue to run the hotel until the final determination of the action. Where other factors appear to be evenly balanced, it is prudent to take such measures as are calculated to preserve the *status quo*.

[Appeal allowed.]

Cases referred to:
American Cyanamid Co. v. Ethicon Ltd. [1975] 1 AER 504
Lumley v. Wagner [1852] 1 De GM & G 604
Hounslow London Borough Council v. Twickemham Garden Developments Ltd. [1971] 1 Ch. D. 232
Foster & Dicksee v. Hastings Corporation [1903] 87 LT 736
Vethanayagam v. Karuppiah & Ors. [1968] 1 MLJ 283

Legislation referred to:
Specific Relief Act 1950, ss. 20, (1)(a), (1)(b), (1)(g), 54(f)

For the appellant - R.R. Chelliah (P. Vijendran with him); M/s. R.R. Chelliah Brothers
For the respondent - C. Abraham (P. Abraham with him); M/s. Abraham & Partners

JUDGMENT

Abdul Hamid CJ Omar (Malaya):

This is an appeal against the order of Peh Swee Chin J, dismissing the appellant's application to set aside an interim injunction granted to the respondent.

The facts are not in dispute. They are set out in the grounds of judgment of the learned Judge. Suffice if we advert to those facts we consider necessary for the determination of this appeal.

The appellant Company Si Rusa Beach Resort Sdn. Bhd. is a wholly owned subsidiary of Si Rusa Inn Sdn. Bhd. which is a private limited company owned by A. Chelliah and members of his family (Owner). Si Rusa Inn started operation in 1950 and has all along been managed and operated by the Chelliah family. A. Chelliah is not only the founder of the hotel but is virtually the owner. In the appellant company he is the executive director.

The respondent is a registered company incorporated in Singapore (Operator). One of its principal objects is to provide multiple services related to the hotel and catering industry especially in the field of management and technical services.

On 14 March 1983 an agreement replacing an earlier agreement was entered into between the parties. The respondent would operate the Hotel. "Before the ink of the parties' signatures on the said agreement dried" so described by the learned Judge the agreement became abortive. The appellant no longer welcomed the respondent.

A word about the agreement. Suffice if we are to reproduce that part of the learned Judge's grounds of judgment where he has stated:

> Under the said Agreement, a very long agreement, which bears the heading in the following words, viz., "MANAGEMENT SERVICES AGREEMENT", very briefly, the Operator is allowed to run the Hotel for ten years, with a further option to the Operator, subject to certain conditions, to a renewal for another ten years on the same terms and conditions, see Article VII of the said Agreement. The Owner has no right to determine the said Agreement except by Article XVI para. 2 in the following circumstances. Where the Operator commits a breach of a condition, the Owner is only entitled to give a written notice requiring the breach to be remedied within 90 days, failing which, a second written notice with a length of 60 to 90 days can be given, of the Owner's intention to terminate the said Agreement, unless during the period of the second notice, the breach has been rectified, or it has been referred to arbitration as provided in the said Agreement, and in either event, the said Agreement shall then remain in force.
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> It has not been disputed by the parties that the said Agreement has never been terminated by the Owner in the manner indicated above.

> Under the terms of the said Agreement, very briefly, the Operator has the right to take over the operation of the Hotel to the exclusion of the Owner, in matters usually relevant to the running of any hotel such as recruitment of staff and fixing their emoluments; fixing of all prices chargeable; advertising and promotion of the Hotel; and bringing of actions in Court in the name of the Hotel. See e.g. Article IV and V. The Operator shall be entitled to what is described in the said Agreement as a technical service fee of 5% of the gross operating profit of each fiscal year, etc. See Article VI.

It is quite apparent that the appellant has no role to play under the agreement that is of any significance except for an account which is to be operated jointly between him and the respondent for the first twelve months. The entire running of the hotel falls upon the respondent.

On 6 June 1983 the respondent made an *exparte* application before the learned Judge for an interim injunction to restrain the appellant, its servants or agents from interfering with the Operator in the running of the hotel.

The affidavit by the managing director of the respondent affirmed on the same date averred that the approach for the respondent to render expertise was made as early as June 1981. This was followed by extensive negotiations. A management agreement between the appellant and the respondent was signed on 7 June 1982. Although this agreement was approved by the Foreign Investment Committee there were the amendments suggested by the Ministry of Trade and Industry which had to be incorporated into the said agreement.

To give effect to the incorporation of the changes the parties agreed that Messrs. Skrine & Co., drew up a new agreement. This was finalised in February 1983 and signed on 14 March 1983.

The respondent alleged that in anticipation of the signing of the agreement, the respondent took over control of the management of the hotel at a meeting held between representatives of the appellant and the respondent on 1 March 1983. This is disputed by the appellant.

There were other averments made by the respondent's managing director in the affidavit. They include *inter alia* matters relating to the appointment of general manager together with secretary and front office manager, and the assistance to be given by the appellant to secure work permit. There was allegation that the appellant obstructed not only the presence of the staff but also the performance of their duties.

There was an allegation that the appellant was interfering and obstructing the respondent from carrying out its contractual obligations.

Sometime in May, 1983 the appellant through Messrs. Skrine & Co., sent a letter to the respondent expressing intention to rescind the contract. The respondent thereafter intimated that if the situation was not remedied they would take appropriate steps in Court. Hence the application for injunction on 6 June 1983. An order for interim injunction was made.

On 28 June 1983 the appellant applied to set it aside. In the affidavit affirmed by I.C. Harichandra, director of the appellant, he denied intention to rescind the contract but alleged that it was a suggestion for a rescission by mutual consent.

Mr. Harichandra also denied that there was approval from the Foreign Investment Committee. It was not necessary. The matter however had to be referred to the Ministry of Trade and Industry and the approval by the Ministry of Trade and Industry had not yet been received. It is the appellant's contention that since Government approval has not yet been granted the contract cannot be validly enforced.

The learned Judge dismissed the application to set aside. He gave careful consideration to the submission made both by Counsel for the respondent and for the appellant.

As regards the meeting held on 1 March 1983 between Operator and Owner, the learned Judge held that the Operator had *de facto* taken over the staff previously employed by the Owner. Nevertheless he observed that as far as the owner was concerned it had at all material times possession and control of the hotel. He also observed that it is a matter to be considered at the trial later whether having regard to the evidence the Operator would be conferred with a right to possession of the hotel on 1 March 1983.

The learned Judge referred to several points raised by the appellant as follows:

(a) That by virtue of s. 20 and s. 54(f) of the Specific Relief Act, 1950 an injunction cannot be granted to prevent a breach of contract which could not itself be specifically enforced;

(b) That an interim injunction in the nature of mandatory injunction cannot be granted save in exceptional circumstances;

(c) That at the time interim injunction was obtained the respondent suppressed the fact that there was an understanding that the owner was to run the hotel until 30 June 1983 and as such the application for the interim injunction was premature.

Consideration was given by the learned Judge to the argument by the Operator to the effect that the agreement conferred a licence to enter the hotel premises and the alternative argument that the Operator had a contractual licence to occupy the hotel with an implied obligation on the part of the owner not to revoke the licence during the period of agreement. And that therefore s. 20(1)(a), (b) and (g) of the Specific Relief Act would not apply.

The learned Judge observed that at that stage of the case, the Court need not embark upon the trial of the issues; the Operator, in seeking interim injunction, need not prove clear title; the Operator is only to satisfy the Court that there are triable issues in connection with the right alleged and that there is doubt as to existence of such right. He held that the Court was satisfied the Operator had succeeded in raising serious questions for trial.

The learned Judge then proceeded to consider the issue relating to contract for personal service on the assumption the contract is such a contract to determine whether specific performance will be granted. He considered *Lumley v. Wagner* [1852] 1 De GM & G 604, *Hounslow London Borough Council v. Twickemham Garden Developments Ltd.* [1971] 1 Ch. D. 232 *Foster & Dicksee v. Hastings Corporation* [1903] 87 LT 736 before concluding thus:

> It will be seen from what is stated above therefore, that irrespective of whether the said Agreement is specifically enforceable, or even if the said Agreement cannot be specifically enforced, the Court could and did in fact issue an interim injunction for the breach of an implied negative stipulation at any rate until the disposal of the action; the implied negative stipulation being that the Owner would not revoke the licence given to the Operator by the said Agreement to enter and remain on the Hotel premises for the purpose of operating the Hotel during the currency of the period of the said Agreement, or until the disposal of this action at any rate.
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> Distinct from what is stated above, there was this prominent issue argued before me as regards the specific enforceability or otherwise of the said Agreement, so that if specifically enforceable, it would give rise to s. 54(f), so much relied on by the Owner. Arising from this issue, I found the following serious questions for trial in connection with s. 20(1)(b) and (g) of the Act:
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> (a) Would the expressly enacted s. 20 of the Act make our Malaysian law on similar points different from the laws in Singapore, England or Hongkong?

(b) Would a contract for personal service be specifically enforceable when the Court would not in reality be asked to superintend any such personal service continuous or running into minute details, etc, to be performed by the applicant for such specific performance; the other person so enjoined, being merely required to do almost nothing, but substantially and merely to allow the applicant to perform such service?

(c) Would there be circumstances in this case after hearing all relevant evidence which would induce this Court to decree specific performance of the said Agreement thereby validating or strengthening a claim for a final injunction?

Having set out in the judgment these questions the learned Judge concluded that the Operator had established to his satisfaction these serious questions for trial and this was one of the requirements for the Court to issue an interim injunction.

Very briefly the learned Judge considered the question of adequacy of damages and held "that the common law remedy of damages would not be adequate because of the injury sustained by the Operator being continuous and therefore irreparable ... also because if the owner were not so restrained, would be uncertain, and lastly because obstructing the Operator would have the practical effect of destroying the subject matter of this action, viz., the benefit under the said Agreement."

Finally, the learned Judge considered the balance of convenience. He held that:

> if the interim injunction were withdrawn, the Operator would sustain a total loss whereas if the interim injunction remained in force, the Owner might not suffer any loss at all, and it might even stand to gain from the participation in the profits (though not in the management), that could be earned by the Operator operating the Hotel in accordance with the terms of the said Agreement. The balance of convenience, I found, was in favour of the Operator.

We have referred to the judgment at some length to show that the learned Judge did consider very carefully the materials before him to determine whether there were serious questions to be tried. He held that there were. We fully agree. In our view these questions clearly arise from the relevant materials disclosed in the affidavits and the documents produced before the Court. Fundamentally, however the question that arises for our consideration is whether the learned Judge was right in the light of the materials before the Court and having regard to the circumstances of the instant case in holding that the balance of convenience was in favour of the respondent.

Mr. R.R. Chelliah, Counsel for the appellant urged upon us to consider two points of law which he said the learned Judge only made casual reference in his grounds of judgment but neither dealt with nor applied them, (a) the appellant's contention that by virtue of s. 20(1)(g) of the Specific Relief Act, 1950 which is reproduced hereunder:

> 20. (1) The following contracts cannot be specifically enforced;
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> (a) ...
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> (b) ...
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> (c) ...
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> (d) ...
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> (e) ...
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> (f) ...
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> (g) a contract the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date;

the contract is clearly one that cannot be specifically performed, and (b) that in view of s. 54(f) which we also reproduce hereunder:

> 54. An injunction cannot be granted
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> (a) ...
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> (b) ...
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> (c) ...
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> (d) ...
>
> (e) ...
>
> (f) to prevent the breach of a contract the performance of which would not be specifically enforced;"

this contract cannot be specifically enforced. It is submitted that if permanent injunction cannot be granted it follows that interim injunction cannot also be granted. Reference is made to *Vethanayagam v. Karuppiah & Ors.* [1968] 1 MLJ 283.

While we appreciate that these questions are crucial indeed they are the main grounds upon which the appellant's case rests, we do not however see the necessity at that stage for the learned Judge to decide on these difficult points of law.

Suffice for the learned Judge to decide, and this he did, that there are serious questions that have arisen for trial. While we agree that there are serious questions of law we are also of the view that these questions are relevant for consideration in determining the grant or otherwise of an interim injunction but the question is should it be the Court's business to resolve these serious and difficult questions of law at that stage of the litigation? We think not. Lord Diplock in the celebrated case of *American Cyanamid Co. v. Ethicon Ltd.* [1975] 1 AER 504 at 510 formally observed that:

> It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims to either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

Proceeding on the basis that the learned Judge was absolutely correct when he in the instant case held that there are serious questions for trial, we can assume therefore that he was satisfied that the Operator's claim is not frivolous or vexatious. Thus the only remaining question to be considered is the balance of convenience. It has been held in the *Cyanamid's* case *(supra)* that:

> There was no rule of law that the Court was precluded from considering whether, on a balance of convenience an interlocutory injunction should be granted unless the plaintiff succeeded in establishing a *prima facie* case or a probability that he would be successful at the trial of the action. All that was necessary was that the Court should be satisfied that the claim was not frivolous or vexatious i.e. there was a serious question to be tried.

On the authority of the *Cyanamid's* case *(supra)* once affidavit evidence shows that there are serious questions to be tried what the Court should consider next is the balance of convenience. To begin with it is necessary, indeed it is the governing principle that the Court should consider whether if the Operator were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by damages for the loss he would have sustained as a result of the owner's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. (See *Cyanamid's* case (*supra*) at p. 510).

In this regard the learned Judge was of the view that damages would not be adequate compensation because the injury sustained by the Operator being continuous is therefore irreparable. He was also of the view that the extent of the damages would be uncertain. In his judgment the effect of the Owner keeping out the Operator would be to deprive the Operator of the benefit under the agreement.

Turning now to the present case it is significant to note that there is a conflict of evidence regarding the date on which the Operator is to commence operation. This is a question of fact and has to be resolved but our view is that it is not for the Court to resolve it at that stage of the litigation. If this question should at the trial of the action be resolved in favour of the Owner then in that event the application by the Operator may be held to have been premature. It is also significant to note that the learned Judge after stating that the Operator had *de facto* taken over the staff previously employed by the Owner recognized the fact that the Owner had at all material times possession and control of the hotel and it was therefore a matter to be considered at the trial later whether having regard to the evidence the Operator would be conferred with a right to possession of the hotel on 1 March 1983.

In our view this may well be one of the factors that should be considered by the Court in determining the adequacy of the respective remedies in damages available to either party or both. Since there are serious factual questions as well as points of law that need to be tried, the question of the adequacy of compensation by an award of damages cannot therefore be properly determined. In that event and since there is a doubt what remains to be considered is the question of balance of convenience. And in this regard "where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the *status quo*". (See *Cyanamid's case* (*supra*) at p. 511).

The question is what, in the instant case, should that *status quo* be? With respect to the learned Judge it would seem to us that his finding that the balance of convenience lay in favour of the Operator, was based solely upon the consideration of the loss to be sustained by the Operator in the event the interim injunction being withdrawn omitting however, to consider what we think is an important factor, and that is that at all material times the Owner was in possession and control of the hotel. Besides, all the licences to run a boarding house and restaurant, sell liquor operate billiard, flipper machines and so forth were all in the name of A. Chelliah personally. That being the case the Operator cannot possibly run the hotel and manage the whole operation without first obtaining the necessary licences.

These are some of the matters which need to be taken into consideration in the present case to decide where the balance of convenience lies. There were other factors which ought also to have been taken into consideration, namely the fact that the Owner had been operating and living there and the fact that the respondent company is a foreign company with no assets in this country. They need to be considered to decide whether *status quo* should be maintained. In our judgment if the *status quo* is to be maintained the only order that can properly be made at this stage is to allow the Owner to continue to run the hotel until the action is finally litigated and a decision made thereon.

For these reasons we allow the appeal with costs. We reverse the order of the learned Judge and order that the interim injunction be set aside. An order for early trial is affirmed.

Also found at [1984] 2 CLJ 13